United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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Pof

76-1007

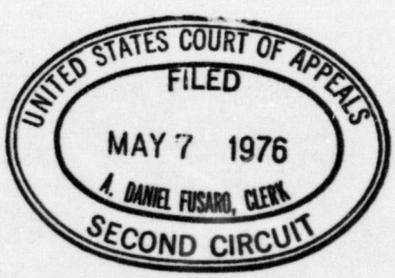
To be argued by
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- GERALD DEVINS, Defendant-Appellant.	Docket No. 76-1007

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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Point I

THE REFUSAL OF THE PROSECUTOR TO PRODUCE THE NOTES OF HIS INTERVIEWS WITH GROSVALET WAS PREJUDICIAL ERROR (Answering Point II-D of the Government's Brief, pp.34-44).

In its brief, the Government contends that defense counsel at trial made a "plainly insufficient showing" that the prosecutor's notes of interviews with Grosvalet, the key Government witness, were proper "3500" material, and for this reason, among others, no error arose in failing to disclose them. This con-

tention is unavailing.

In addition to the argument on this matter contained in appellant's principal brief (p.82), it is important to remember that the trial judge did not refuse to order disclosure based on any inadequacy in the foundation for the defense request. Rather, the court made it clear that at trial it would refuse to direct disclosure, whatever the foundational showing, based on an unstated theory of "work product" exemption, which had previously been argued by the prosecutor:

> THE COURT: ... [N]otes of interviews by an Assistant U.S. Attorney are not required to be turned over not even if the witness looked over the notes and adopted them as his own. Look at the Morrison [sic] case, Mr. Coven.
>
> (463).*

This case, then, presents substantially the same situation as in Goldberg v. United States, 44 U.S.L.W. 4426, ___ U.S. ___ (March 30, 1976). There, as Justice Powell wrote in his concurring opinion so heavily relied on by the Government here:

> ... But [the trial court] did not deny the motion because of the insufficient foundational showing. Rather, he ruled that the "work product" privilege protected the pro-

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*The court appeared to be mistakenly relying on United States v. Myerson, 368 F.2d 393 (2d Cir. 1966). In Myerson, this Court held that the "witness sheets" in that case were not "3500 material" since they were not statements made by the witness "and signed or otherwise adopted or approved by him." 368 F.2d at 395-396. Here, unlike Myerson, the court seemed to say that the interview notes would not be producible, regardless of whether the notes were "adopted or approved" by the witness.

> secutors' notes. Goldberg's counsel may not have sought to supplement his foundational showing because he had been led reasonably to believe that he had carried the burden of showing the necessity of an inquiry, and that the judge's denial was based solely on the mistaken view as to the "work product" privilege. For this reason, I concur in the judgment to remand.
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> 44 U.S.L.W. at 4433. Footnotes omitted.

Here, too, appellant's counsel could reasonably have been led to believe, in view of the basis for the court's ruling, that he would not receive disclosure of the interview notes irrespective of the adequacy of the foundational showing made. Thus, here, as in Goldberg, the fact that the foundational showing may have been inadequate (and we do not concede it was) is irrelevant.

Relying on the opinions of the four concurring Justices in Goldberg, the Government further argues that Grosvalet never "adopted" the prosecutor's notes as his own statement because he "was never asked to sign the statement, nor was it ever suggested that he would be obliged to stand by every word and nuance conveyed" in the prosecutor's notes (Government's Brief, p.42). The short answer to this argument is that nowhere in Goldberg can there be found authority for the impossible standard urged by the Government. Neither the opinions in Goldberg nor the Jencks Act itself (18 U.S.C. §3500(e)(1)) requires that a witness sign a statement or that he must know he is "obliged to stand by every word and nuance conveyed" in such statement, in

order to render it producible.

Rather, the majority in Goldberg required, as a starting point, that the prosecutor read back to the witness, or the witness read, what the prosecutor has written. 44 U.S.L.W. at 4429, n.19. Beyond that, as the concurring opinions of Justices Stevens and Stewart make clear, there must be a finding of "unambiguous and specific approval by the witness," and not merely "[g]eneral testimony that some of the notes taken by the prosecutor during a lengthy interrogation were read back to the witness, and that the witness sometimes assented to the prosecutor's version of what he said...." 44 U.S.L.W. at 4434-4435.

It is appellant's contention that these criteria were met by Grosvalet's hearing testimony when he stated:

> ... I know that [the prosecutor] wrote things that were my own words; and in reading back the questions and answers, I had the same questions about some of the answers, and in discussing them, we came to a final answer that was usually, if not all the time, my answer; the way I had known it to be.
>
> Q. In other words, your own words?
>
> A. Right.
>
> (Hearing, 203),

and by his later description at the hearing of the prosecutor's notes: "If the sentence was only a few words, then I think I believe he wrote them out verbatim. Otherwise, for the most part they were notes ... [of] actually what I did say to [the prosecutor]" (Hearing, 224).

The process thus described by Grosvalet was not the haphazard, equivocal acceptance by the witness of the version contained in the prosecutor's notes disapproved by the concurring opinions in Goldberg. Instead, Grosvalet described a process more nearly approximating a meeting of the minds in which the resultant notes represented verbatim or in substance exactly what Grosvalet had meant to convey. Grosvalet could therefore have reasonably been expected to understand, even if he was not told so, that he was "formalizing a statement upon which he may be cross-examined," 44 U.S.L.W. at 4432 (Justice Powell and the Chief Justice, concurring), and certainly, as described by Grosvalet, at least some portion of the notes was "in a form which either party could use to prevent the witness from testifying to facts inconsistent with those stated to the interviewer." 44 U.S.L.W. at 4434 (Justices Stevens and Stewart, concurring).

Because the "adoption or approval" requirement of the Jencks Act was more clearly demonstrated in this case than in Goldberg (see 44 U.S.L.W. at 4430, n.1 (Justice Powell, concurring)), we have contended in appellant's principal brief (p.83, n.71) that there is no need to remand this case to the District Court for further fact-finding on the question, as was done in Goldberg, in order to reverse appellant's conviction. However, should this Court be inclined to the view, based on an examination of the prosecutor's notes which have now been made part of the record, but which appellate counsel has never

seen, that the notes are probably not producible under the Jencks Act, this Court should remand the case to the District Court for determination of the issue in the first instance in light of Goldberg. As the Court stated in Goldberg:

> ... The Court of Appeals erred in undertaking to make the initial determination whether the materials constituted producible "statements." If that function may ever be properly undertaken by a court of appeals, the Court of Appeals should not have attempted to make the determination in this case.
>
> 44 U.S.L.W. at 4428.

Finally, the Government contends that, even assuming arguendo that the interview notes were producible under §3500, the non-disclosure was not deliberate, and therefore the standard to be applied is whether there is a significant chance that the withheld material, developed by skilled counsel, could have induced a reasonable doubt in the minds of the jurors (Government's Brief, p.43). However, the prosecutor's failure to disclose the material to defense counsel was in fact a deliberate refusal, albeit one based upon a mistaken interpretation of the Jencks Act, and not simply inadvertence. It is therefore at least arguable that the stricter standard for intentional non-disclosure should apply, i.e., a new trial is required if the evidence is merely material or favorable to the defense. United States v. Hilton, 521 F.2d 164, 166 (2d Cir. 1975).

Point II

DEFENSE COUNSEL MADE A TIMELY MOTION FOR A MISTRIAL BASED ON THE IMPROPER ADMISSION INTO EVIDENCE OF FERGUSON'S TESTIMONY (Answering Point II-A of the Government's Brief, pp.23-27).

The Government misleadingly contends that appellant's trial counsel failed to make a prompt motion for a mistrial in regard to the erroneously admitted testimony of the Viet Nam veteran, John Ferguson, and therefore appellant should not now be heard to argue for a reversal of the conviction on that basis (Government's Brief, pp.26-27). In fact, defense counsel moved for a mistrial based on Ferguson's testimony both before the testimony was stricken by the court (904-907), and afterwards (1127). Thus, defense counsel was clearly not content "to rest on the striking of the testimony and the Court's curative instructions" (Government's Brief, p.26).

Moreover, contrary to the Government's assertion (Government's Brief, p.26, fn.), no insult to the District Court was implied in the statement contained in appellant's principal brief that a "trial judge should not be permitted to insulate an admitted error from appellate review simply by stating on the record that he did not 'feel' the error had any effect on the jury" (Appellant's Brief, p.61), and certainly none was intended. Rather, that statement was intended to reflect our contention that, at the time the District Court denied the motion for a mistrial in mid-trial, it could not possibly have known the prejudicial impact such testimony would have on the

jury until all the evidence was in. For example, the court could not have foreseen the prosecutor's argument in summation that appellant was responsible for duping Grosvalet, "[t]he guy who is a Viet Nam vet" (2119), thereby unavoidably recalling to the jury Ferguson's earlier testimony. Thus, not only was the court's "feeling" that no prejudice resulted to appellant as a result of Ferguson's testimony unfounded when the court made that observation, it became doubly so in light of later events in the trial. In short, this Court has at least as good an opportunity to assess the prejudicial effect of that testimony since this Court, unlike the District Court, can view it in the context of the entire record. Accordingly, as stated in appellant's principal brief (p.61), "the trial court's belief that Ferguson's testimony was 'harmless error' ... [s]hould not be given any particular weight."

Point III

THE GOVERNMENT'S CASE AGAINST APPELLANT WAS FAR FROM BEING STRONG ENOUGH TO MAKE THE INADEQUATE REPRESENTATION OF DEFENSE COUNSEL HARMLESS ERROR (Answering Point I of the Government's Brief, pp.12-23).

The Government contends that the proof of appellant's guilt was so overwhelming that, even if appellant received far better representation than he did, the jury's verdict would not have been different (Government's Brief, p.17). The proof of guilt, however, was far from overwhelming.

Central to the charges against appellant was the question of whether the film distribution contract between Grosvalet's company and National TelePix was valid and, if it was not, whether appellant knew it. While it was proven at trial that National TelePix did not actually own the Wally Western film series at the time the contract was entered into with Grosvalet, it was shown that National TelePix's parent company, ADI, did own the rights to those films and had the power to transfer the distribution rights to its subsidiary, NTP, which in turn could assign the rights to RBG. In fact, Elvin Feltner, the president of ADI, called as a hostile witness by appellant, testified that ADI did execute a license agreement in April 1974 giving the right to transfer the films to RBG (1718-1719, 1766, 1838). Moreover, Feltner tried to convince Grosvalet in July 1974 to accept delivery from King of the contracted-for films since by

that time there was no question that National TelePix had the power to transfer the films to RBG. Grosvalet, however, refused.

Thus, the jury could have found that, even as of the time of trial, there existed a valid, enforceable contract between NTP and RBG upon which NTP, through Feltner and King, were ready to make good, thereby establishing that the collateral listed in Grosvalet's SBA application was not illusory. Indeed, Grosvalet himself never complained of appellant's conduct in the transaction. Rather, he had gone to the New York State Attorney General's office to complain of Hill's and King's conduct in failing to provide him the agreed-upon films.* That the jury might have so found had it not been for the inadequate representation appellant received and other trial errors, is supported by the fact that the jury did acquit Hill on all counts.

Moreover, even if NTP was not in a position to transfer the film rights to RBG, or did not intend to, there was little evidence at trial that appellant must have known that. Both Richard Shields, a prosecution witness, and Feltner testified that appellant had no interest in or connection with NTP. Furthermore, unlike King, Hill, and Feltner, appellant realized

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*It is worth remembering that at the post-trial hearing, Grosvalet testified that he had "quite possibl[y]" told the prosecutor that appellant had warned him not to give any money to Hill or King until Grosvalet had received the films from them, advice which appellant had in fact given to Grosvalet.

no real profit from the proceeds of Grosvalet's SBA loan, but only $3,900 which was to pay for RBG's office rental in premises owned by appellant and advertising to be done by a company owned by appellant.

In short, the evidence against appellant cannot be characterized as "overwhelming," and therefore the errors at trial cannot be deemed "harmless."

CONCLUSION

For the above-stated reasons and the reasons argued in the principal brief for appellant, the judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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